THE SUPREME COURT OF ONTARIO
THE HONOURABLE W. G. C. HOWLAND
CHIEF JUSTICE OF ONTARIO

OSGOODE HALL
TORONTO, ONTARIO M5H 2N5
363-4101

May 11, 1982

The Honourable R.Roy McMurtry,Q.C.,
Attorney General for Ontario,
18th Floor,
18 King Street East,
Toronto, Ontario.
M5C 1C5.

Dear Mr.Attorney,

Re: Preliminary Hearings

I am pleased to enclose a copy of the Report of the Special Committee on Preliminary Hearings which was under the Chairmanship of the Honourable Mr.Justice Arthur Martin, together with the minority report of Mr.Earl J. Levy,Q.C. and Mr.R.G.Thomas,Q.C. The majority report was approved at the meeting of the Bench and Bar Council on April 19th last by a very substantial majority of 14 to 2 (with 5 abstentions). You will note that both the majority and minority reports recommend that there should be a voluntary trial period. Before embarking on a trial period, it would be well to know the intentions of your Ministry, and of the Federal Department of Justice as to the implementation of the Report by legislation.

Would you also consider the forwarding of the Report to the Federal Minister of Justice and its release to the press. I think that the Chief Justices of the other Provinces would also be interested in its recommendations, and I will send them a copy, if you are in agreement. I should be pleased to discuss these matters with you at your convenience.

Yours very sincerely,

Encl.

REPORT OF THE SPECIAL COMMITTEE ON PRELIMINARY HEARINGS

INTRODUCTORY

Your Committee was appointed to consider and make recommendations with respect to the Outline of A Proposed Committal For Trial And Disclosure System To Replace The Present Preliminary Hearing And Related Procedures prepared by the Ministry of the Attorney General for Ontario. Attached to this report as Schedule "A" is a copy of the Outline of A Proposed Committal for Trial and Disclosure System to which is annexed A Draft of Guidelines to Crown Attorneys and Other Crown Counsel in the Ministry of The Attorney General With Respect to Disclosure By the Crown Dated February 27, 1981, which guidelines were put into effect in Ontario as a pilot project for one year as of October 1, 1981. The two documents are intended to be read together since the outline proposed is based on the assumption that the guidelines are already in force.

The outline of the proposed disclosure system was prepared by the Ministry of the Attorney General for transmission to the Federal Department of Justice as a basis for legislation and in response to mounting concern over the increasing length of preliminary hearings, the resulting delays in the criminal justice system and the hardship that they impose on witnesses.

The Committee is made up of the following members:

Chairman	-	THE HONOURABLE MR. JUSTICE G.ARTHUR MARTIN Court of Appeal for Ontario
Member	-	THE HONOURABLE G. T. EVANS CHIEF JUSTICE OF THE HIGH COURT OF ONTARIO (THE HONOURABLE MR. JUSTICE J.G.J. O'DRISCOLL attended on behalf of Chief Justice Evans at the meetings of September 22, 1981 and November 10, 1981)
Member	-	THE HONOURABLE MR. JUSTICE C. L. DUBIN Court of Appeal for Ontario
Member	-	HIS HONOUR JUDGE LLOYD K. GRABURN County Court of the Judicial District of York
Member	-	HIS HONOUR F.C. HAYES CHIEF JUDGE Provincial Court (Criminal Division)
Member	-	HIS HONOUR H.A. RICE ASSOCIATE CHIEF JUDGE Provincial Court (Criminal Division)
Member	-	E. G. EWASCHUK, ESQ., Q.C. Director, Criminal Law Amendments Section Department of Justice, Ottawa
Member	-	G. H. McCRACKEN, ESQ. Senior Counsel, Criminal Prosecutions Toronto Regional Office Department of Justice (Replacing L. R. OLSSON, ESQ., Q.C. Department of Justice, Toronto)

Member	-	R. M. McLEOD, ESQ., Q.C. Assistant Deputy Attorney General and Director of Criminal Law Ministry of the Attorney General, Toronto
Member	-	J.D. TAKACH, ESQ., Q.C. Deputy Director of Criminal Law and Director of Crown Attorneys Ministry of the Attorney General, Toronto
Member	-	J. D. BOWLBY, ESQ., Q.C. Treasurer, Law Society of Upper Canada
Member	-	R. G. THOMAS, ESQ., Q.C. President, Criminal Lawyers Association, Toronto
Member	-	EARL J. LEVY, ESQ., Q.C. Vice-President Criminal Lawyers Association
Member	-	ARTHUR MALONEY, ESQ., Q.C. Criminal Lawyers Association
Ex Officio Member	-	THE HONOURABLE W. G. C. HOWLAND CHIEF JUSTICE OF ONTARIO
Secretary	-	BORIS KRIVY, ESQ., Q.C. Executive Officer for the Chief Justices
Secretary	-	NANCY S. KASTNER Law Clerk to the Chief Justice of the High Court

Your Committee met on 7 occasions; June 2, 1981, June 29, 1981, August 18, 1981, September 22, 1981, November 10, 1981, January 28, 1982, March 16, 1982.

The Committee at its first meeting considered whether it should invite submissions by individuals and organizations, but concluded that having regard to the size of the Committee and its broad composition, the Committee, initially, at any rate, should not invite submissions but should endeavour to reach its conclusions based on existing research, the experience in other countries, and the experience of the members of the Committee.

The Committee by a large majority is satisfied that preliminary hearings are becoming excessively long, making unnecessary and excessive demands upon judicial time and imposing severe hardship on witnesses who may be required to attend on several occasions as a result of adjournments. Statistics kept within the Ministry of the Attorney General of Ontario which show the relative percentage increase in workload in (1) Provincial Court (Criminal Division) trials;

(2) County and District Court trials, and (3) Preliminary hearings in the Provincial Court support the conclusion. Annexed as Schedule "B" is a chart showing the percentage increase in workload from 1976 to 1982, which shows a thirty per cent increase in Provincial Court trials, a one hundred and sixty-one per cent increase in County and District Court trials and a one hundred and sixty-five per cent increase in preliminary hearings.

The Committee is unanimously of the view that any modification of the preliminary hearing must provide for a screening mechanism to protect an accused against being required to stand trial on a charge unless a judicial officer is satisfied of the existence of a prima facie case against him.

THE PRELIMINARY HEARING - ITS FUNCTION

It became apparent to the Committee at a very early stage of its proceedings that one of the fundamental questions that the Committee would be required to consider

was the purpose that the preliminary hearing legitimately serves, since any modification of the preliminary hearing should be responsive to its purpose. The Supreme Court of Canada has stated in the clearest terms that the purpose of the preliminary hearing is to determine whether there is sufficient evidence to put the accused on trial.[1] The view of the Supreme Court of Canada as to the purpose of the preliminary hearing accords with that of the English Courts. Thus, provided that the prosecution can establish a prima facie case by the witnesses it does call, it is not obliged to call any particular witness at the preliminary hearing even though that witness is a very important one such as the complainant in a sexual case, and even though the defence wishes that witness called; and a committal for trial will not be quashed for failure to call the witness.[2]

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1. - Patterson v. The Queen, [1970] S.C.R. 409 at 412; Caccamo v. The Queen (1975), 21 C.C.C. (2d) 257 at 275 (S.C.C.).

2. - R. v. Epping and Harlow Justices: Ex parte Massaro (1972), 57 Cr. App. R. 499 (D.C.); R. v. Grays Justices, Ex parte Tetley (1979), 70 Cr. App. R. 11 (D.C.).

Although the purpose of the preliminary hearing is to ensure that no one shall be required to stand trial unless there is a prima facie case against him, it has by long tradition and practice incidentally provided an accused with the opportunity of ascertaining the case he has to meet. Ordinarily, the Crown does not restrict the evidence it calls at the preliminary hearing to the bare minimum required to enable the Justice to form an opinion that there is sufficient evidence to put the accused on trial, but if the Crown chooses to do so the only protection the accused has against surprise at the trial is the practice, strictly enforced in England, of requiring the Crown to serve the accused in advance of the trial with a copy of the statements of witnesses the Crown proposes to call at the trial who were not called at the preliminary hearing. It is only in more recent times that the English rule of practice requiring the Crown to furnish the defence with copies of statements of witnesses intended to be called at the trial who were not called at the preliminary hearing has been considered in all parts of Canada as essential to a fair trial and as such strictly enforced by the Courts.[3]

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3. - See R. v. Demeter (1975), 25 C.C.C. (2d) 417 at p. 445 (Ont.C.A.) affirming the established rule of practice.

It has become customary in Canada for defence counsel to use the preliminary hearing to probe for weaknesses in the testimony of the witnesses called by the Crown, to elicit information that may provide the foundation for an attack on credibility at the trial, and to tie the witness down. In the hands of skilful counsel and used with restraint, this type of cross-examination can be a valuable aid as a means of obtaining discovery of the Crown's case. It is, perhaps, correct to say that this incidental purpose served by the preliminary hearing has been more highly developed and used in this country than in other common law jurisdictions. This aspect of the preliminary hearing can, however, lend itself to abuse by time consuming "fishing expeditions" and lengthy cross-examinations which serve no useful purpose. The preliminary hearing was never intended to be a first trial.

The provisions of s. 469 of the Code are also used to obtain discovery of the Crown's case at the preliminary hearing. After the evidence of witnesses called by the prosecution has been taken, the Justice is required by s. 469(3) to ask the accused if he wishes to call any witnesses and s. 469(4) requires the Justice to hear each witness

called by the accused who testifies to any matter relevant to the inquiry. Under these provisions the accused can call prosecution witnesses (if he can ascertain their identity) in order to discover their evidence.[4]

Neither the common law nor the Criminal Code provides for any general formal system of disclosure, and disclosure in the past has been largely discretionary. It is precisely because the law does not provide for any general disclosure procedure that the preliminary hearing, designed for a different purpose, has been made to serve the purpose of discovery. The Comprehensive Study Report of The Law Reform Commission of Canada, as published in 1974, expresses the view that because the preliminary hearing is designed for the purpose of ensuring that there is sufficient evidence to warrant putting an accused on trial, it is, and always will remain unsuitable for providing pre-trial "discovery".

The Report states at p. 71:

> Taking a new approach, why not reverse these two objectives? The first objective of pre-trial procedure should be to fully inform the accused of the prosecution

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4. - R. v. Misko (1945), 85 C.C.C. 410 (Ont.H.C.); Re Ward and The Queen (1976), 31 C.C.C. (2d) 466 (Ont.H.C.), aff'd., 31 C.C.C. (2d) 466n (Ont.C.A.).

> brought against him. Then, having achieved this objective, the second objective of allowing for a completely unsupported charge to be dismissed and for an accused to be consequently discharged can then be achieved.

On the other hand, the preliminary hearing has staunch supporters, including Sir David Napley. It is said that cross-examination of witnesses at the preliminary hearing may elicit facts, data and leads which may unearth witnesses who would otherwise not be available. The system of 'disclosure', it is said, would not provide these 'discovery' aspects of the preliminary hearing. On the other hand, the strength of the Crown's case may convince an accused that he should plead guilty; that it will serve to delineate the issues and shorten the trial by making it apparent to counsel that it is unprofitable to pursue certain lines of defence. The preliminary hearing, of course, provides a means of perpetuating evidence. These are weighty arguments.[5] It must be pointed out, however, that in many cases preliminary hearings do not result in shorter trials. Indeed the converse tends to be true; as preliminary hearings have become longer, trials have also become longer.

The majority of the Committee consider that the advantage to the accused of a preliminary inquiry can be

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5. - The Case for Preliminary Inquiries by David Napley, [1966] Crim.L.R. 490; A Perspective on The Abolition of The Preliminary Inquiry by Ken Chasse, Criminal Lawyers Association Newsletter, vol. 4, April 1981, p. 42.

compensated by providing a satisfactory system of pre-trial disclosure which has not hitherto existed, and that the interests of the accused can be effectively protected by the safeguards which the Committee recommends.

Some of the most effective cross-examinations are made with respect to witnesses who have not testified at the preliminary hearing, where the defence has been given adequate notice of the intention of the Crown to call the witness, and has been provided with a copy of the witness's statement. On the other hand, nothing is more ineffectual than confronting a witness at the trial with minor variations in his testimony at trial from that given at the preliminary hearing.

It must be borne in mind, moreover, that the preliminary hearing is available only in a relatively small percentage of cases. The Study Report of The Law Reform Commission of Canada points out that the preliminary hearing is used in about seven per cent of indictable offences, and, of course, is unavailable in summary conviction offences. Taking all offences together nearly ninety-five per cent of all criminal cases go to trial with no preliminary hearing being held.[6]

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6. - See Study Report of The Law Reform Commission of Canada on Discovery in Criminal Cases, p. 66.

The proposed system, if properly applied, will result in an accused obtaining more information about the case he must meet than he now is able to obtain. It extends to indictable offences in the absolute jurisdiction of the Provincial Court Judge and to summary conviction offences, in respect to which, of course, a preliminary hearing is not available as a means of disclosure.

THE EXPERIENCE IN OTHER COMMON LAW JURISDICTIONS

The preliminary hearing in England has been considerably modified in practice by s. 2 of the Criminal Justice Act 1967 which provides that, subject to certain conditions, a witness's written statement is admissible in evidence at the preliminary inquiry to the same extent as his oral evidence. The statement must be signed by the person who made it and contain a declaration that it is true and that he made the statement knowing that if it were tendered in evidence he would be liable to prosecution if he wilfully stated anything which he knew to be false. The defence can refuse to accept the statement and require the witness to be called subject to the right of the prosecution not to call the witness if he can make out a prima facie case without that witness.[7]

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7. - R. v. Grays Justices, Ex parte Tetley, supra.

Section 2 however, contains a safeguard that the Court may on the application of either party or of its own motion require that a witness attend before the court and give evidence.[8]

The committal procedure under the Criminal Justice Act 1967 is alternative to the conventional preliminary hearing under s. 7 of the Magistrates' Courts Act 1952.[9] In actual practice, however, the committal procedure under the Criminal Justice Act 1967 would appear to have largely supplanted the conventional preliminary hearing under s. 7 of the Magistrates' Courts Act 1952. The Royal Commission on Criminal Procedure, in the Law and Procedure Volume, states at p. 70:

> There is no information kept nationally of the use made of committals under s. 1 of the Criminal Justice Act 1967 as opposed to those under s. 7 of the Magistrates' Courts Act 1952.* It is generally thought that the proportion of the latter to the former is extremely small and the limited research information that is available bears out this impression. In a study of cases committed for trial by Sheffield Magistrates' Court during 1972, only one case out of a total of 356 had full committal proceedings, and of 2,406 cases sent for trial in the Crown Court at Birmingham during 1975 and 1976, only four had full committals; in 18 others some of the evidence had been given orally.

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8. - Study Report, pp.68 - 70.

9. - The Royal Commission on Criminal Procedure, Law and Procedure Volume, p. 69.

* - The relevant provisions of the Criminal Justice Act 1967 and the Magistrates' Courts Act 1952 are now incorporated in the Magistrates' Courts Act 1980.

The Australian States and New Zealand have followed the English model. The English bar has apparently found the 'packet' of material with which they are supplied under the Criminal Justice Act 1967 satisfactory, and the conventional preliminary hearing, as indicated above, has largely fallen into disuse. The Royal Commission on Criminal Procedure in England has recently recommended in a report of January 1981 that committal proceedings, as such, should be abolished subject to the right of the accused to move for a discharge. It would appear, however, that the majority favoured the view that, upon the "application for discharge", the sufficiency of evidence would be determined by the Magistrates' Court on the basis of written material.[10] The Royal Commission also recommended the extension of pre-trial disclosure procedures to summary trials of indictable offences and summary conviction offences. In the United States the emphasis in recent times has been on the development of procedures for pre-trial disclosure, and it appears that the preliminary hearing when used has a limited function to ensure that there is a prima facie case against the accused to warrant the defendant being required to stand trial. The Study Report of The Law Reform Commission of Canada, supra, noted that in Israel, where criminal procedure is derived from the common law, the preliminary hearing was abolished in 1965 when a new code of criminal procedure was enacted,

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10. - Report of The Royal Commission on Criminal Procedure, pp. 181-183; [1981] Crim.L.R. 445.

making statutory provision for disclosure of the "material of investigation in the possession of the prosecutor". The prosecutor is precluded from producing any evidence in court unless the accused or his counsel has been given a reasonable opportunity to inspect and copy the evidence or the statement, if any, made by the witness in the investigation, except where the right to do so has been waived.[11]

PROPOSED COMMITTAL FOR TRIAL AND DISCLOSURE SYSTEM

A. THE COMMITTEES' VIEWS AS TO THE ADEQUACY OF THE DISCLOSURE PROVIDED FOR IN THE ATTORNEY GENERAL'S OUTLINE OF THE PROPOSED DISCLOSURE SYSTEM AND IN THE GUIDELINES

The Outline and the Guidelines envision disclosure at four different stages in the proceedings and also a continuing duty by the Crown to make additional disclosure of any further material that comes into the possession of the Crown up to and including the trial.

The initial disclosure provides basic information and is provided to the accused not later than his first appearance. At this stage of the proceedings the accused may not have counsel. The Committee has been informed that defence counsel have found this initial disclosure helpful

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11. - Study Report of The Law Reform Commission of Canada, pp. 115-117.

when requested by an accused to act for him or her. Annexed as Schedule "C" is a sample initial disclosure document.

Following the initial disclosure, the accused must be afforded sufficient time to retain counsel, appear in court with counsel, set time limits for the further disclosure meetings contemplated by the Outline, and to fix dates for election and committal proceedings where the accused elects to be tried by a judge and jury or a judge without a jury or where the offence is within s. 427.

We are informed that the interval between the first appearance and the retaining of counsel is sometimes unduly prolonged and that legislation should provide for an outside time limit in which to retain counsel or to proceed without counsel to the next stage above set out.

The Stage III disclosure provided for in the Outline appears to be sufficient for the limited purpose of setting a date to proceed with a trial if the accused elects trial before a Provincial Court Judge, or to proceed to a committal proceeding, as the case may be; although there are still some outstanding differences of opinion in relation to the disclosure provided for in the Outline. The majority of the Committee considers that the present wording of the disclosure provisions in Stage III (g) is unsatisfactory, in

that the names and addresses of witnesses proposed to be called by the Crown in chief should be provided unless there is good reason for withholding them. The Committee recognizes, however, that there may be cases where, even though there is no reason to believe that the witness will be subject to intimidation, the desire of the witness to maintain his privacy and not to be subject to interviews at his home or his place of business is a legitimate cause for concern to the Crown. Where, however, the only reason for withholding the name and address of the witness is a concern to protect the witness' privacy, the Crown, as an alternative to disclosing the name and address of the witness, should be under an obligation to provide a mechanism whereby the witness may, if the defence wishes, be interviewed privately at the police station, or in the office of the Crown Attorney, or other suitable place.

The Committee also considers that the second part of paragraph (g) should be amended to provide that, where names and addresses of Crown witnesses are supplied, the police may be asked to contact the witness, rather than the present provision that in the circumstances the police should be asked to contact the witness. The majority of the Committee are also of the view that the proposed disclosure system should contain an express provision that an accused

upon request should be provided with a copy of any oral or written statement of the accused in the possession of the police or the Crown, whether or not the Crown proposes to introduce the statement as part of its case in-chief.[12] The Committee is also of the view that express provision should be made in the Outline for Crown counsel to supply the defence, upon request and upon being given reasonable notice, with any relevant criminal record of a proposed Crown witness.[13]

B. COMMITTAL FOR TRIAL ON WRITTEN MATERIAL

The majority of the Committee are in favour of the substitution of a disclosure procedure and committal for trial on "written material" subject to the safeguards hereafter outlined.

The Attorney General's Outline provides for the committal for trial of an accused on "written material" which is not limited to signed statements of a witness but extends to unsigned written statements, "will say" statements, and synopses.

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12. - Savion and Misrahi v. Regina (1980), 13 C.R. (3d) 259 (Ont.C.A

13. - Note the Guidelines to Crown Attorneys provide for such disclosure where Crown counsel decides that the record of the witness is relevant.

The Committee is conscious of the fact that many police officers resist providing statements to defence counsel, and that witnesses are sometimes reluctant to give statements, especially signed statements, if they know that defence counsel will be supplied with those statements. The Committee is also conscious of the fact that it will take time to educate the police in the taking of statements that will provide a proper basis for committal on written statements.

Although the present provisions in the Attorney General's Outline providing for committal for trial on "written material", in general, constitute a satisfactory basis for a voluntary system of committal for trial on written material on a trial basis, the replacement of the preliminary hearing by a disclosure system and committal for trial on written material on a permanent and legislated basis should be founded on written statements of a witness with respect to which the witness may be cross-examined. The witness's statements, generally speaking, should also be signed by the witness. The witness who refuses to sign a statement has no cause for complaint if his refusal to sign his statement constitutes a factor to be taken into account by the judge in deciding whether to require the witness to

attend and give evidence under oath on committal proceedings. The Committee has had the opportunity of examining statements of witnesses supplied under the Criminal Justice Act 1967. These statements are detailed in nature and signed by the witness.

One of the advantages of the preliminary hearing, as perceived by defence counsel, is that skilful cross-examination of witnesses at the preliminary hearing or the cross-examination of the officer-in-charge of the investigation sometimes leads to the uncovering of material that is helpful to the defence. The Attorney General's Guidelines to Crown Attorneys recognizes the duty of the Crown to make the defence aware of the existence of any evidence which may be helpful to the defence. Some members of the Committee, however, have expressed concern that Crown counsel might be unaware of the existence of evidence helpful to the defence because such evidence had not been disclosed by the police to Crown counsel. The Committee recommends the officer-in-charge of the investigation be required to certify to Crown counsel that he is not aware of any other facts or information either in support of the Crown's case or the defence. Crown counsel is then in a position to carry

out his obligation under the Committal and Disclosure System in the knowledge that the police have formally assured him that they have provided all information which is relevant to the case for the Crown or the defence.

The Outline assumes that, for the purpose of committal, the written statements and other material will constitute "evidence" to the same extent as if the statements and written material had been given or verified under oath. This is fundamental to any system of committal for trial on written material. The Outline also assumes that there will be no voir dire requirements with respect to the admissibility of the "evidence", but that all evidence tendered will be admissible unless the Court is satisfied that there is no "arguable" basis for its admission at the trial. The Committee suggests that "reasonable" should be substituted for "arguable" in paragraph iii of Appendix "A" of the Outline.

If the Outline is implemented by legislation, it will constitute a reversal of the present rules of evidence applicable at the preliminary hearing which exclude evidence unless shown to be admissible under the ordinary rules of evidence. The Committee considers that the proposal is, in

general, acceptable. Where the Crown proposes to introduce a statement made by an accused to a person in authority which the accused wishes to contest as not having been obtained voluntarily, the accused may, by leave of the Provincial Court Judge, call the officers concerned in the taking of the statement and examine them under oath as to the circumstances surrounding the taking of the statement. As previously indicated, however, the Judge on committal proceedings, for the purpose of committal only, will admit the statement unless he is of opinion that there is no admissible at the trial. The present case law is that at the preliminary hearing, as at trial, a statement made by the accused to a person in authority is excluded unless the Judge conducting the preliminary hearing is satisfied beyond a reasonable doubt that the statement was voluntary.[14]

C. THE RIGHT TO REQUIRE A WITNESS OR WITNESSES TO BE EXAMINED UNDER OATH

The Outline of the proposed Committal For Trial and Disclosure System as originally drafted made no provision

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14. - R. v. Norgren (1975), 27 C.C.C. (2d) 488 (B.C.C.A.); R. v. Pickett (1975), 28 C.C.C. (2d) 297 (Ont.C.A.).

for the right to call a Crown witness in respect of whom the defence had been supplied with a copy of his statement. The Crown, however, if it chose could require a witness to attend for examination under oath by not filing the witness's statement. The accused under the Outline had an absolute right to call any "defence" witness such as an alibi witness.

The majority of the Committee were firmly of the opinion that any committal for trial and disclosure system must make provision for an application by the accused to a Provincial Court Judge for leave in appropriate circumstances to require a particular witness or witnesses to be examined under oath. A small minority of the members of the Committee were of the view that there should be an absolute right to require witnesses in certain categories, for example, the victim, to be examined under oath; and a qualified right to require other witnesses to be examined by leave. The majority were, however, of the view that to provide an unqualified right to require witnesses in certain categories to be examined under oath would have the effect of superimposing the existing preliminary hearing on a pre-trial disclosure system, which would do little, if anything, to reduce the length of preliminary proceedings and might likely increase their length.

A majority of the members of the Committee would be in favour of replacing the preliminary hearing with a satisfactory pre-trial disclosure procedure and permitting the committal for trial of an accused on written statements of witnesses and exhibits subject to three safeguards:

(a) Although it is anticipated that in the majority of cases the Crown would proceed exclusively on the basis of such written statements and exhibits, the Crown may examine a witness or witnesses viva voce rather than filing written statements with respect to the evidence of that witness or witnesses.

(b) The accused after hearing any viva voce evidence and after being provided with complete disclosure of written material, may move for discharge on the ground that there is no evidence to warrant putting the accused on trial.

(c) The Judge before whom the committal proceedings takes place may, of his own motion or on the application of the accused, require any witness to attend and be examined under oath notwithstanding the statement of the witness has been filed, where he is of the opinion that the interests of justice require that the witness be examined, taking into account the following factors:

1) The nature of the witness and his evidence (e.g. victim, accomplice, children of tender years, identification, police officer taking a statement from accused etc.) and the importance of his evidence in relation to the issues in the case.

2) The completeness of the statement of the witness with which the accused has been furnished, having regard to the importance of his evidence, and whether the statement is signed or unsigned, whether the name and address of the witness has been disclosed, or whether he has been interviewed by the defence.

3) The ability of the Provincial Court Judge to assess the sufficiency of the evidence of the witness for the purpose of s. 475 on the basis of written documentation rather than oral evidence.

4) Whether there is reason to believe that the examination of the witness might result in the discharge of the accused.

5) Whether in all the circumstances the examination of the witness is essential to a fair trial.

It is contemplated by the Committee that on a motion for discharge the Provincial Court Judge will have before him all the material which had been filed and that he will apply the test enunciated in United States v. Sheppard (1976), 30 C.C.C. (2d) 424; namely, whether there is any evidence upon which, if believed, a reasonable jury properly instructed could return a verdict of guilty.

The Committee also contemplates that on an application to require a witness to be examined under oath, the Provincial Court Judge will have the entire disclosure material before him, to enable him to properly exercise his discretion whether the interests of justice in all the circumstances require that the witness be examined under oath. The statement of a witness, standing alone, might be lacking in sufficient particularity, but considered along with statements of other witnesses and other written material, might provide the defence with sufficient information as to the nature and content of the witness's evidence without the necessity of having the witness examined under oath. Where the Provincial Court Judge grants leave, he should be empowered in his order requiring a witness to attend for examination under oath to specify, where appropriate, the scope of the examination.

The Committee gave careful consideration whether there should be a right of appeal from the refusal of the Provincial Court Judge to require that a witness be required to attend for examination under oath. The Committee concluded that there should be no right of appeal. Provision for an appeal would add another layer of proceedings which would be productive of further delay.

The Committee is of the view that any review of the Provincial Court Judge's decision not to require a witness to be examined under oath can more appropriately be dealt with by the trial judge. The application should be made before the trial judge on adequate notice. The trial judge would have a range of sanctions at his disposal, including adverse comment on the failure of the Crown to make adequate disclosure or, if necessary in the interest of justice, the power to declare a mistrial. In addition, if he considers that the disclosure is inadequate he could, for example, require further disclosure and adjourn the trial to enable the defence to prepare for trial. He could, where he considers it desirable that a witness be examined under oath, direct the examination to take place before him in a voir dire type of procedure; such a procedure would be in harmony with the proposed omnibus legislation to permit voir dire to be held prior to the trial to determine, for example, the admissibility of a confession.

The Committee recommends that legislation implementing a committal for trial and disclosure system to replace the present preliminary hearing should not be enacted until the proposed system has been in force on a voluntary basis for a sufficient length of time to permit an assessment to be made of its operation and sufficiency.

The Committee wishes to express its thanks to Mr. Boris Krivy, Q.C., and Miss Nancy Kastner for the invaluable assistance that they have rendered to the Committee.

Dated: March 16, 1982.

G. Arthur Martin

/jlp

SCHEDULE "A"

OUTLINE OF A PROPOSED COMMITTAL FOR TRIAL AND DISCLOSURE SYSTEM TO REPLACE THE PRESENT PRELIMINARY HEARING AND RELATED PROCEDURES

Prepared by the Criminal Law Division
Ministry of the Attorney General
for Ontario. March 12, 1981.

Stage I — Compelling Appearance of Accused:

A. Process Issues; Appearance Notice, Summons etc., or Arrest and Judicial Interim Release hearing.

B. Basic information is provided to accused no later than first appearance in Court after judicial interim release hearing. This will be taken from revised police occurrence report in the manner suggested in the draft "Guidelines to Crown Attorneys and other Crown Counsel" dated February 27, 1981, paragraph 5, attached hereto.

C. Interval required by accused to retain Counsel:

NOTE:

1) This period of time traditionally causes much delay. The Crown is not in a position to force accused persons or their legal representatives to expedite this period of time. The Court, however, is in an excellent position to shorten this period but has not demonstrated a willingness to do so by enforcing reasonable time limits. One reason why the Provincial Court has been reluctant is because the Court of Appeal has made it clear that a Provincial Court should safeguard the right of an accused to counsel of his choice.

2) The provisions of Part XV of the Criminal Code should contain a specific reference to the ability of the Judge (or the Justice) to proceed without counsel where he is satisfied that the accused has had a reasonable opportunity to obtain counsel of his choice who is prepared to proceed to Stage II within a reasonable period of time.

3) An alternative to the Court enforcing reasonable time limits at this stage is for the federal government to enact statutory time limits. If it proposes to do so, this is the first place where time limits should be legislated.

Stage II — First Provincial Court Appearance After Stage I:

A. Accused appears with Counsel or with written consent of Counsel to be noted as Counsel of record and to set time limits and dates as hereinafter noted.

OR

Accused appears without Counsel, prepared by himself to set time limits and dates as hereinafter noted.

AND

B. Time limits set for Stages III, V A. and V B., and

C. Dates set for Stages IV and VI.

NOTE:

This Court Appearance should be held in a Court that commences at 9.00 a.m. so that Counsel will not be prevented by reason of other court appearances from attending.

Stage III — Upon the request of Counsel or his agent, disclosure, either orally or by access to documents, or in writing where possible of:

(a) a copy of any written statement by the accused to a person in authority and disclosure of any oral statement made by the accused to a person in authority of which the Crown is aware and which the Crown, at the time of disclosure, intends to tender as part of the Crown's case-in-chief at trial or an undertaking to provide same when available;

(b) a copy of relevant laboratory and/or scientific reports if available or an undertaking to produce same when available;

(c) disclosure of the accused's criminal record;

(d) a copy of any medical report which relates to the accused or the victim and which is directly relevant to the charge(s) or an undertaking to produce same when available;

(e) photos, films and other documents intended to be entered: where preparation and resources permit and the nature of the exhibits suggest it is reasonable for the Crown to provide copies they should be provided; in other cases, an opportunity to inspect will be sufficient; even in those cases where it is appropriate to provide copies, it is recognized that it will often not be possible to provide such copies at this early date in which event an undertaking to produce prior to the preliminary hearing or trial will be sufficient;

(f) an outline or synopsis of the evidence of the witnesses whom the Crown, at the time of disclosure, intends to call as part of the Crown's case-in-chief at trial; a verbal outline or synopsis, with a reasonable opportunity to take notes shall be sufficient for the purpose of providing counsel with sufficient information to set a date to proceed with a trial or preliminary hearing as the case may be; if a written outline or synopsis is available at this early stage, it may be provided in lieu of a verbal outline or synopsis;

(g) any further information Crown Counsel considers appropriate including, where circumstances warrant, the names and addresses of witnesses whom the Crown at the time of disclosure proposes to call as part of the Crown's case-in-chief at trial; in any case where names and addresses of witnesses are provided, the police should be asked to contact the witness to advise the witness of the fact that he or she may be contacted by the Defence and that it is up to the witness to decide if he or she wishes to be interviewed.

Stage IV — Second Provincial Court Appearance with Counsel - Election by Accused:

A. (i) Accused elects trial by Magistrate and

(ii) Date set for Stage VIII

(iii) Trial date set (Stage IX).

OR

B. Accused elects trial by Judge and Jury, or by Judge alone, (and Section 427 offences).

Stage V

NOTE: Where accused elects trial by Magistrate, Stages V A, V B, VI and VII are omitted.

Stage V

Part A.

(i) Provision by Crown to Defence of copies of written material, if any, that Crown intends to file on Committal Hearing in the event that accused elects trial in higher Court, or in the event that trial in Supreme Court is required.

(ii) Notice by Crown to Defence of viva voce evidence intended to be called by Crown on Committal Hearing.

NOTE:

1) The "written material" referred to above will take the form of:

(a) signed written statements;

- or -

(b) synopses of the witnesses' statements prepared by the Crown;

- or -

(c) "will say" statements;

- and -

(d) copies of exhibits identified by the evidence contained in (a), (b) or (c) above;

2) It is hoped that by reducing Court time for Crown Attorneys and police officers, more time will be available out of Court to be used to obtain more actual signed written statements or synopses prepared by the Crown rather than "will say" statements for provision to the defence at this stage and for filing at Stage VI. However, until a

procedure such as this evolves and more preparation time is made available, it is not only contrary to the best interest of the administration of justice but virtually impossible to confine such written material to actual signed written statements. It is as much in the Crown's interest as in the accused's to obtain as many actual signed written statements as possible at this stage but the best interest of the administration of justice demand that the signed written statements not be obtained in a hurried fashion.

3) No Court Appearance required at Stage V A.

Part B.

Notice by Defence to Crown of viva voce evidence intended to be called by Defence on Committal Hearing.

NOTE:

No Court Appearance required at Stage V B.

Stage VI - Third Provincial Court Appearance with Counsel:

(i) Crown files "written material" with Court, and

(ii) viva voce evidence called by Crown and/or Defence, and

(iii) Committal Hearing based upon the viva voce evidence, if any, and written material, filed, and

(iv) in event of committal, remand to Assignment or other trial Court.

NOTE:

See Appendix "A" attached for provisions applicable to Committal Hearing.

Stage VII - First appearance in Trial or Assignment Court, and

(i) date set for Stage VIII and

(ii) trial date set. (Stage IX).

Stage VIII — Additional disclosure, if any by the Crown prior to trial: the Crown at this stage should provide either actual signed written statements, or synopses of evidence of witnesses prepared by the Crown, or "will say" statements with respect to any witness who at the time of this disclosure, the Crown intends to call as part of the Crown's case at trial, if such written material was not provided to the defence earlier at Stage V A, unless in the opinion of the Crown there are extraordinary circumstances which make such disclosure inappropriate.

Stage IX — Trial.

DRAFT

February 27, 1981

GUIDELINES TO CROWN ATTORNEYS AND OTHER CROWN COUNSEL IN THE MINISTRY OF THE ATTORNEY GENERAL WITH RESPECT TO DISCLOSURE BY THE CROWN IN CRIMINAL CASES

Introduction

1. It is recognized that generally there is a duty on the Crown:

(a) to disclose the Crown's case;

and (b) make defence aware of the existence of any other evidence relevant to the main issues which may be helpful to the defence and which is worthy of consideration by the Court but which the Crown may not intend to call as part of its case.

2. These guidelines are intended to provide a method of making such disclosure.

3. It is recognized that the precise mechanics or procedures adopted in carrying out these guidelines will vary from jurisdiction to jurisdiction throughout the Province and will be determined by the local Crown Attorney in accordance with local Crown and Police resources and with the needs of the local Defence Bar.

4. Generally, disclosure with respect to summary conviction and hybrid offences need not be as formalized as with other indictable offences.

First Appearance Disclosure

5.(a) Where resources and personnel permit the accused should be provided at the time of his first appearance with a document similar in nature to Appendix "A" to these guidelines.

(b) Where resources and/or personnel are insufficient to provide such a document, the Crown should take every reasonable step necessary to ensure that any accused or his counsel or counsel's agent who seeks such information at or near the time of the first appearance is given such information orally.

Disclosure Sufficient to Enable Counsel to Set a Date to Proceed

6. As soon as possible after the first appearance and in any event before the date set for the purpose of setting a date (which in some jurisdictions is referred to as an assignment court date), the Crown, at the request in writing of counsel for the accused or counsel's agent, should provide the following:

(a) a copy of any written statement by the accused to a person in authority and disclosure of any oral statement made by the accused to a person in authority of which the Crown is aware and which

the Crown, at the time of disclosure, intends to tender as part of the Crown's case-in-chief at trial or an undertaking to provide same when available;

(b) a copy of relevant laboratory and/or scientific reports if available or an undertaking to produce same when available;

(c) disclosure of the accused's criminal record and, where in the Crown counsel's view relevant, the criminal record of any witness;

(d) a copy of any medical report which relates to the accused or the victim and which is directly relevant to the charge(s) or an undertaking to produce same when available;

(e) photos, films and other documents intended to be entered: where preparation and resources permit and the nature of the exhibits suggest it is reasonable for the Crown to provide copies they should be provided; in other cases, an opportunity to inspect will be sufficient; even in those cases where it is appropriate to provide copies, it is recognized that it will often not be possible to provide such copies at this early date in which event an undertaking to produce prior to the

preliminary hearing or trial will be sufficient;

(f) an outline or synopsis of the evidence of the witnesses whom the Crown, at the time of disclosure, intends to call as part of the Crown's case-in-chief at trial; a verbal outline or synopsis, with a reasonable opportunity to take notes shall be sufficient for the purpose of providing counsel with sufficient information to set a date to proceed with a trial or preliminary hearing as the case may be; if a written outline or synopsis is available at this early stage, it may be provided in lieu of a verbal outline or synopsis;

(g) any further information Crown counsel considers appropriate including, where circumstances warrant, the names and addresses or witnesses whom the Crown at the time of disclosure proposes to call as part of the Crown's case-in-chief at trial; in any case where names and addresses of witnesses are provided, the police should be asked to contact the witness to advise the witness of the fact that he or she may be contacted by the

Defence and that it is up to the witness to decide if he or she wishes to be interviewed.

Further Disclosure Prior to the Date Set to Proceed with a Preliminary Hearing or Trial

7.(a) Fulfil any undertakings made pursuant to paragraphs 6(a), (b), (d) and (e) above.

(b) In summary conviction and hybrid matters the verbal outline or synopsis of the evidence of witnesses provided in the manner described in paragraph 6(f) above together with the disclosure provided pursuant to paragarph 5 shall, as a general rule, be sufficient if Defence counsel has been sufficiently informed in that manner prior to the setting of the date to proceed.

(c) In indictable (non-hybrid) matters, Crown counsel should, at the request in writing of counsel for the accused or counsel's agent, provide a written outline or synopsis of the evidence of the witnesses whom the Crown at the time of disclosure, intends to call as part of the Crown's case at trial, unless in the opinion of the Crown there are extraordinary circumstances which make such disclosure inappropriate. Such a written outline or synopsis may take the form of a document prepared for the purpose of disclosure,

copies of "Will Says", or where considered appropriate by Crown counsel, copies of statements of the witnesses which have been reduced to writing.

8. Crown counsel, in his discretion, shall determine how disclosure prior to the preliminary hearing or trial can be made to an unrepresented accused.

9. It is expected that although Defence counsel will use his own discretion as to what portion of the content of written disclosure he will communicate to his client, it is expected that he will refrain from providing such written disclosure or copies thereof to his client.

10. It is expected that when the written disclosure is in the form of a "Will Say" or synopsis:

(a) Defence counsel will refrain from any attempt to treat such written disclosure as a statement made in writing or reduced to writing for purposes of s.10 of the Canada Evidence Act, or, for the purpose of similar cross-examination at a preliminary inquiry;

and (b) if counsel chooses to cross-examine on the content of the document, he will refain from doing so without first applying to the Court to have the jury excluded for

> the purpose of determing whether the "Will Say" statements is a notation of a prior oral statement relative to the subject matter of the case and inconsistent with the witness' present testimony so as to permit cross-examination pursuant to s.11 of the Canada Evidence Act.

11. In indictable (non-hybrid) matters it is expected that after receiving the disclosure referred to above Defence counsel will advise the Court and the Crown, prior to the date set to proceed, the forum in which his client elects to be tried.

NOTE: EXPLANATION OF APPENDIX "A"

The attached document is a blank version of a document which is used in Scarborough. It is created by placing a pre-printed template over the police occurrence report and photostating with the result that the unnecessary and inappropriate parts of the police report are removed and replaced with the Notices to the Accused.

By the wording of s.5(a) of the Guidelines, it is intended that each jurisdiction would try to develop its own mechanism for creating a document which would serve the purpose. It is not suggested that the document must be precisely the same as this one.

APPENDIX "A"

NOTICE OF ALLEGED OFFENCE(S)

GIVEN NAME(S)

ADDRESS | TEL. NO. | PREVIOUS ADDRESS

TAKE NOTICE THAT you are hereby provided with a brief summary of the facts disclosed at this time by the police investigation without prejudice to the Crown subsequently in these proceedings. This summary is prepared by the police and shall not be considered as particulars or disclosure of the Crown's Case.

INVESTIGATED BY | UNIT | UNIT NO.

DAY - DATE - TIME OF OFFENCE | LOCATION

SUMMARY OF ALLEGED FACTS

AND FURTHER TAKE NOTICE THAT disclosure of the Crown's case be obtained by your counsel, if any, upon his attendance by appointment with the DUTY CROWN COUNSEL during normal office hours at 1911 Eglinton Avenue East, Scarborough. (Telephone 757-2886)

You are advised to deliver this notice forthwith to your counsel.

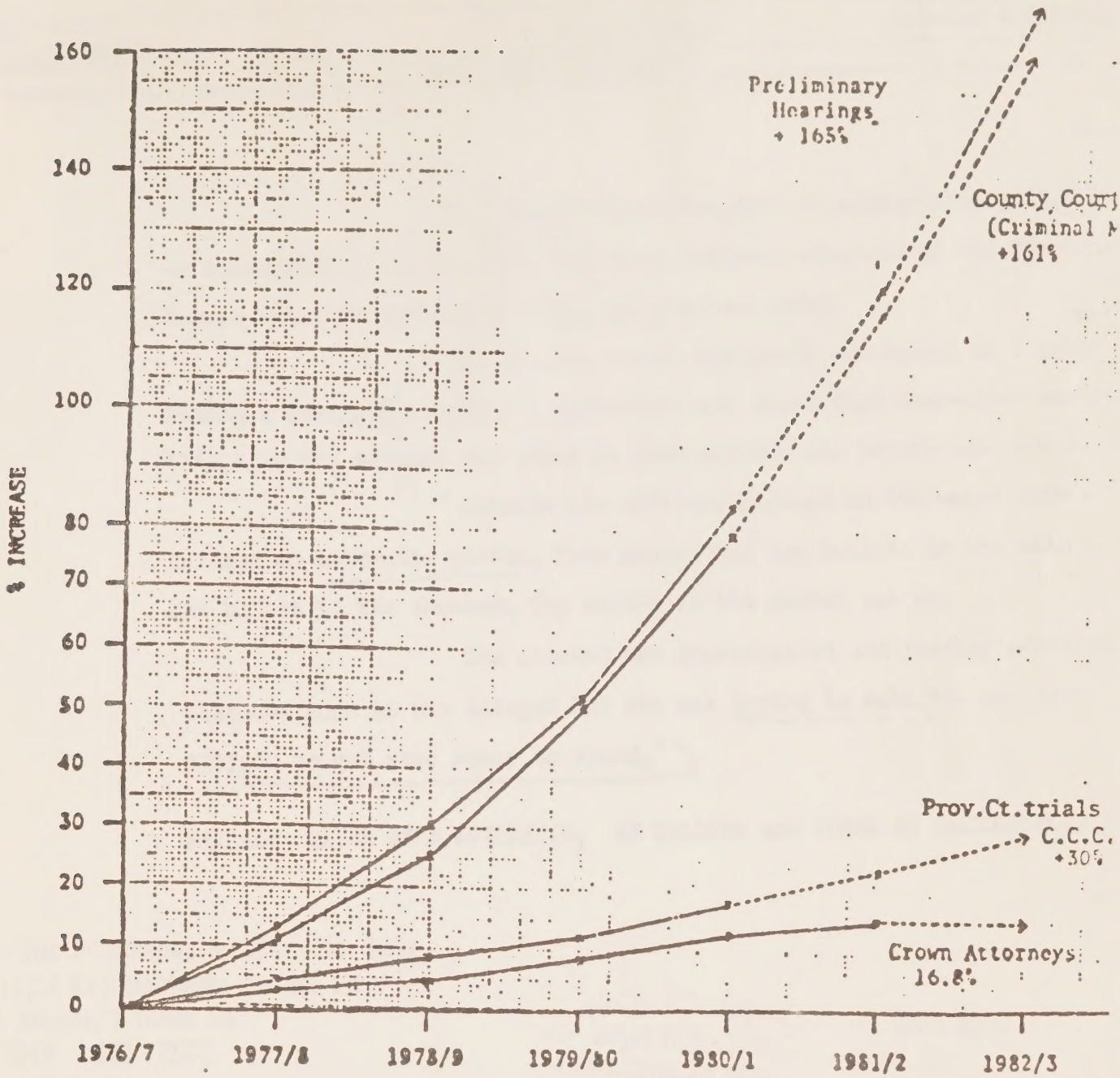
Crown Attorney's Office

MINISTRY OF THE ATTORNEY GENERAL

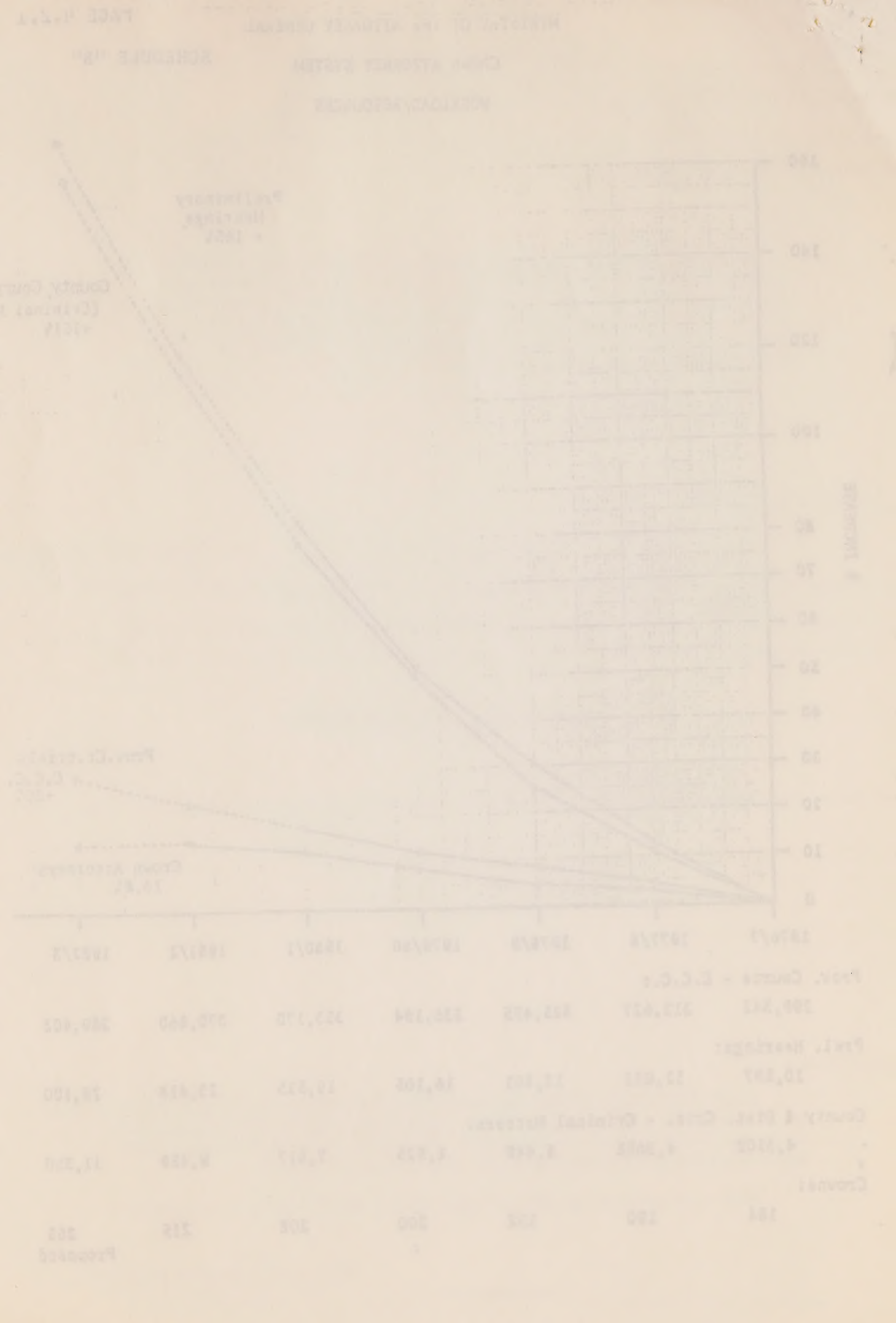
CROWN ATTORNEY SYSTEM

SCHEDULE "B"

WORKLOAD/RESOURCES



	1976/7	1977/8	1978/9	1979/80	1980/1	1981/2	1982/3
Prov. Courts - C.C.C.:	299,342	312,627	325,495	336,194	353,170	370,860	389,403
Prel. Hearings:	10,597	12,022	13,801	16,105	19,515	23,418	28,100
County & Dist. Crts. - Criminal Matters:	4,350E	4,865E	5,449	6,525	7,817	9,459	11,350
Crowns:	184	190	192	200	208	215	265 Proposed



RECORD OF

SCHEDULE "C"

Summons Application ☐ ☐ Offences Act

NAME OF ACCUSED	CHARGE	
	Possession of Restricted Weapon,	
ARRESTING/ISSUING OFFICER(S)	UNIT	INDICATE ORIGINAL ARREST DATE
6229/6556/3680/3701	14 Plainclothes	October 2nd, 1981.

Above as per original report

IF SYNOPSIS HAVE SUFFICIENT DETAILS FOR A PLEA OF GUILTY, SCRIBE TIME AND PLACE OF EACH OFFENCE - INDICATE CO ACCUSED NAME(S) - ENCLOSE SUITABLE PHOTO

On Friday October 2nd, 1981 at approximately 11.00pm on information received, the arresting officers attended at the Pinafore Tavern which is located at 650½, Queen Street West.

The accused before the court was seated at a table having a drink. The officers approached and identified themselves and at this time the accused was asked to step outside the tavern with the officers.

Outside the officers located in the waist band of accused an automatic pistol. This pistol had two bullets in the clip and one bullet in the chamber. The safety on the pistol was on.

The accused was investigated and readily admitted that she knew it was illegal but she was trying to sell the gun for $275.00 to get some money to spend.

SEIZED: RAVEN ARMS AUTOMATIC, 25 CALIBRE and THREE 25 CALIBRE BULLETS

For further information on this case, have your Legal Representative contact the Crown Attorney's Office at: 965-7349 965-7500.

THIS REPORT PREPARED BY	RANK	NUMBER	UNIT
	P.C.	3680	14 Plcs
DATE & TIME OF THIS REPORT	STATION SERGEANT		
October 3rd, 1981	SIGNATURE	S/3324	

DISTRIBUTION: INSERT IN CONFIDENTIAL INSTRUCTIONS FOR CROWN COUNSEL

RETENTION: REFER TO SOURCE DOCUMENT